S
342.05
A13m
Vol. 1, No. 5
Sept. 1977

SHELVED WITH PERIODICALS

Montana State Library
3 0864 1004 9117 7

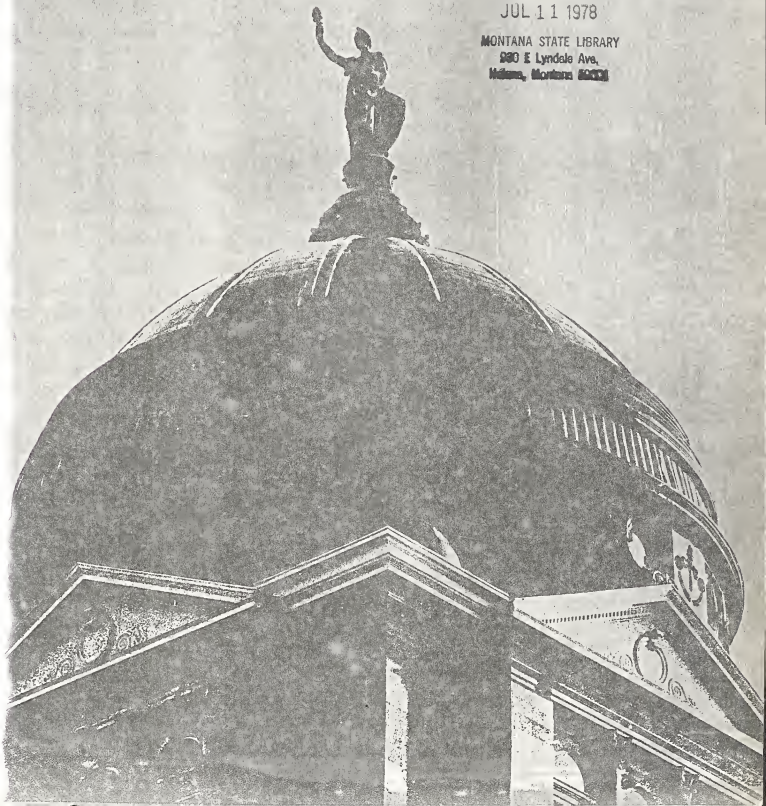
MONTANA PROSECUTOR

September, 1977 Volume 1, No.5

STATE DOCUMENTS COLLECTION

JUL 11 1978

MONTANA STATE LIBRARY
930 E Lyndale Ave.
Helena, Montana 59601



INTRODUCTORY NOTES

The Attorney General's Office has conducted a review of all Department of Justice publications in an effort to economize and avoid duplication. It has been decided that an Attorney General's journal will be published quarterly incorporating many aspects of current publications. As a result, bulletins to MCAA members concerning matters of immediate importance will still be distributed, but matters of general interest will be published in the County Prosecutor Services section of the journal. In the future references to recent cases will be included in the journal.

The brief bank index is being updated. This is a time consuming task as there are approximately thirty briefs that have to be read and indexed. Fortunately, the legal services staff attorneys are assisting in the process. When the index is complete it will be distributed.

In addition to a grant application for out-of-state prosecutor training which is mentioned later, a grant application for in-state training is being prepared for submission to the MBCC. After consultation with the training committee members and Jim McCann it has tentatively been decided to have a fall training conference in Billings on December 1,2, and 3rd in conjunction with the fall business meeting. Plans are now being made and further information concerning the specifics will be sent to you at a later date. Please make plans to attend and try to set aside that block of time. Attendance is an important factor when funding is being considered. All prosecutors and their deputies are encouraged to attend.

Appended to this issue are proposed instructions for conspiracy cases. They have been used in cases in Missoula County and are submitted for your consideration and possible use.

During the Montana County Attorneys Convention, which was held July 13-15, 1977 the following persons assumed the offices listed either as a result of election or appointment by the President, James A. McCann.

OFFICERS

President:	James A. McCann, Wolf Point
1st Vice President:	W. G. Gilbert III, Dillon
2nd Vice President:	William A. Spoja, Lewistown
3rd Vice President:	Richard P. Heinz, Polson
Secretary:	Robert Brooks, Broadus
Treasurer:	Keith D. Haker, Miles City

DIRECTORS

A. Evon Anderson, Fort Benton
Harold F. Hanser, Billings
Ronald W. Smith, Havre
Robert Deschamps III, Missoula
J. Fred Bourdeau, Great Falls
Charles A. Gravely, Helena

NDAA State Director: Denzil Young, Baker

COMMITTEES

Standing Legislation Committee
All officers and directors

Resolutions Committee
Roy Rodeghiero, Golden Valley County
Robert Funk, Garfield County

Nominations Committee
Gordon Hickman, Wheatland County
Paul Murphy, Judith Basin County
Rae V. Kalbfleisch, Toole County

1978 Convention Program Committee
Ronald Smith, Hill County
Douglas Anderson, Pondera County
Thomas Budewitz, Broadwater County
Marc Racicot, County Prosecutor Services Bureau

1978 Convention Site Committee
James McCann, Roosevelt County

Board of Crime Control Liason
Arthur Ayers, Carbon County

State Board of Forensic Sciences Member
Donald White, Gallatin County

Special Committee to Meet with State Board of Institutions
J. Fred Bourdeau, Cascade County
Robert Brooks, Powder River County
Charles Gravely, Lewis & Clark County

Training Coordinator Committee
Robert Deschamps, Missoula County
Robert Brooks, Powder River County
Harold F. Hanser, Yellowstone County
William Spoja, Fergus County
John L. Pratt, Musselshell County

Governor's Task Force on Medicaid Fraud
Robert L. "Dusty" Deschamps

Campaign Practices Advisory Committee
Charles A. Gravely

* * * * *

A grant application has been sent into the Montana Board of Crime Control to obtain money for out-of-state training seminars for prosecutors. Notification should be received in the near future as to the outcome.

Following is a calendar of events, of the training sessions and seminars that you can look over and perhaps submit a request to attend. Tentatively, if the grant is received from MBCC applications for attendance will be processed by the Attorney General's Office. Plans call for a 5% local investment (match) with the actual processing of the application to be handled by the County Prosecutor Services Bureau and Centralized Services Division. Once we are notified that the grant is available all prosecutors will be notified and the application procedure explained.

MCAA bulletin

CALENDAR OF EVENTS

ct.	
2 - 5	NCDA Crime and the Elderly, Tampa, Florida
.1 - 15	NCDA Organized Crime, Houston, Texas
5 - 29	NCDA Trial Techniques, Chicago, Illinois
0 - Nov. 3	National Council of Juvenile Court Judges and NDAA, New Juvenile Justice Standards, Washington, D.C.
30 - Nov. 5	Arbitration Advocacy in Public Education, Portland, Oregon
ov.	
.0 - 13	Hypnosis Techniques to Criminal Investigation and Law Enforcement, Los Angeles
13 - 16	NCDA Law Office Management, San Francisco
.6 - 19	NCDA Trial of a Drug Case, El Paso, Texas
30 - Dec. 2	ODAA Winter Conference, Sheraton Motor Inn, Portland, Oregon
)ec.	
4 - 9	NCDA Advanced Organized Crime, Columbus, Ohio
6	Fact Finding: Practice and Procedures in Oregon and Washington Public Education, Portland, Oregon

n. 1978

- 20 NCDA Prosecutor's Office Administrator Course, Houston, Texas

- Feb. 1 NCDA Major Fraud, San Diego, California

-

- 15 NCDA Pretrial Problems Seminar, Denver, Colorado

- Mar 2. NCDA Organized Crime, Indianapolis, Indiana

NDAA Mid-Winter Conference, San Francisco, California

rch

- 17 NCDA Investigators School, Location to be announced

- 18 NCDA Trial Techniques, Los Angeles, California

ril

- 12 NCDA Crimes Against Persons, Orlando, Florida

- 28 NCDA Advanced Organized Crime, Dallas, Texas

-

- 26 NCDA Prosecutor's Office Administrator Course, Part I, Houston, Texas

ne

- 23 NCDA Executive Prosecutor Course, Houston Texas

y

- 8 ODAA Summer Conference, Sunriver, Oregon

- 28 NCDA Career Prosecutor Course, Houston, Texas

*Other training programs sponsored by LEAA and NDAA are expected to be announced as they become available. Notice of those programs will be communicated to all county attorneys.

RECENT CASES

COUNSEL

Where trial judge pointed out conflict of interest and defendant nevertheless kept the attorney, defendant waived any error. United States v. Villarreal (5th Cir.) 554 F. 2d 235.

FELONY MURDER

Entry of an apartment with the intent to commit an assault with a deadly weapon constitutes burglary, and the intent to assault necessary to constitute burglary does not merge the subsequent murder with the burglary. Thus, where the defendant entered the victim's apartment and subsequently shot and killed the victim, it was proper to convict him of first degree murder, felony murder, and first degree burglary. Blango v. United States (D.C. App.) 373 A. 2d 855.

ORDER OF PROOF

Court did not err in allowing FBI agent to testify out of turn where trial was delayed and agent had other commitments, and where his expert testimony would be subject to subsequent motion to strike for failure to establish chain of custody. State v. Earley (R.I.) 373 A.2d 162.

PRIOR CONVICTION

Evidence of a "prior" (the "prior" crime and conviction occurred between the initial crime and the trial on the initial crime) conviction properly admitted in United States v. Hawley (2nd Cir.) 554 F.2d 50.

PROBATION CONDITIONS

Proper to send defendant to prison for violating a term of his probation that he should associate only with law abiding citizens. United States v. Albanese (2nd Cir.) 554 F.2d 543.

DRUGS AND NARCOTICS

Person acting at behest of and solely for others when he purchases drugs may be convicted of possession of drugs, thus it was proper to refuse instruction saying if defendant was agent of others he should be acquitted. State v. Young (App.-Div. 2) 564 P.2d 385.

CONSPIRACY

Proof of agreement as element of conspiracy may be inferred from the conduct of the conspirators. United States V. Netlerville (5th Cir.) 553 F.2d 903.

DRUGS AND NARCOTICS

Proper to admit defendant's offer to sell more heroin than what he'd sold, in the ensuing prosecution for completed possession with intent to sell. Roberts v. State (Fla.App.) 345 So.2d 848.

SEARCH AND SEIZURE

An inadvertent good faith search of a two family dwelling which looked like a one family dwelling, resulting in the discovery of narcotics in the part of the house the search warrant apparently was not intended to cover, was upheld. State v. Maudling (Ore.App.) 564 P.2d 729.

WITNESS EXCLUSIONARY RULE

It was doubtful a prosecutor talking to all his witnesses at once, after rule had been invoked violated the rule, but if it did, the defendant had remedies other than mistrial. His failure to show prejudice sufficient for a mistrial resulted in the conviction being affirmed. State v. Dodge (Utah) 564 P.2d 312.

PLEA BARGAINING: REPORT

A 550-page report of a 21-month study of plea bargaining conducted by Georgetown University Law Center's Institute of Criminal Law and Procedure was released July 3rd. The report urges an end to the secrecy surrounding plea bargaining and recommends that a record of all discussions be kept. Secrecy contributes to the public's lack of understanding and distrust of the process. The popular belief that through bargaining defendants are getting shorter sentences that they deserve is not always true, according to the report. A plea to one count, induced by overcharging, may result in the defendant receiving a sentence no different than he would have received at trial, it was found.

The report completes phase one of the study, which began in October, 1975, under a $303,000 grant from the Law Enforcement Assistance Administration's research arm, the National Institute of Law Enforcement and Criminal Justice. It examines the general operations and problems of plea bargaining in the United States.

PLEA BARGAINING - CONTINUED

The report found that there is inadequate information upon which to predicate a truly national study and therefore this report is based primarily on a survey consisting of on-site interviews and observations, conducted in 26 state and local jurisdictions. Phase two of the study began June 1 under a $439,000 LEAA grant. It will study six jurisdictions and examine the roles of the judge, prosecutor, defense lawyer, and police officer in plea bargaining.

Discussing the lack of uniform standards in many district attorneys' offices, the study said: "We believe all prosecutors should develop policy guidelines with respect to plea bargaining decision making and these guidelines should be specific. Another kind of accountability should exist; internal accountability of assistant prosecutors to their superior officer. If office policies are to have meaning, and if the chief prosecutor is to be the chief policy-setter for the office, such internal accountability is a necessity. This means that the chief prosecutor must be able to determine who made the critical decisions in a case, on what grounds, and whether there was appropriate clearance from a supervisory official. By and large, this type of internal accountability does not exist in many prosecutors' offices."

MIRANDA

Appellant was convicted of two counts of Murder. ISSUE: Were appellant's rights violated by not giving Miranda when he was questioned at his home? RULING: No, although he was a suspect and the questions were incriminating, he was not in custody. State v. Hatton, Arizona Sup. Ct. No. 3405, July 6, 1977.

WARRANTLESS SEARCH: CURTILAGE: RESOURCE CASE

It has been held that a goose house that was more than 400 feet from a farm dwelling could not be considered within the curtilage of the dwelling such that a warrant based upon probable cause for search of the goose house would be required, just as it would for the dwelling. This is an excellent resource case on the question of distance of a building from a dwelling in considering whether the building is within the curtilage of the dwelling. Over a dozen federal cases are cited and discussed. With the exception of one case, the cases display a symmetry and relatively clear rule, i.e., any building or area within 75 feet of a house is within the curtilage and any building or area further than 75 feet is outside the curtilage. United States Ex Rel. Saiken v. Bensinger, 546 F.2d 1292, 7th Cir., 1976.

WARRANTLESS SEARCH: PROBABLE CAUSE: SCHOOLS

The Supreme Court of Washington has held that school administrators do not need probable cause to conduct warrantless searches of students. Such searches are permissible if the school official has reasonable grounds to believe that it is necessary to maintain school discipline and order. "The high school principal is not a law enforcement officer. His duty as the chief administrator of the high school includes a primary duty of maintaining order and discipline in the school. In carrying out this duty, he should not be held to the same probable cause standards as law enforcement officers. Although a student's right to be free from intrusion is not to be lightly disregarded, for us to hold school officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials. Maintaining discipline in schools often times requires immediate action and cannot await the procurement of a search warrant based on probable cause. We hold that the search of a student's person is reasonable and does not violate his Fourth Amendment rights, if the school official has reasonable grounds to believe the search is necessary in the aid of maintaining school discipline and order. The factors to be judged in determining whether the school official had reasonable grounds are the child's age, history, and school record, the prevalence and seriousness of the problem in the school to which the search was directed, the exigency to make the search without delay, and the probative value and reliability of the information used as a justification for the search." State v. McKinnon, 558 P.2d 781, Wash., 1977.

THE GUILTY PLEA: VOLUNTARINESS: THE PLEA BARGAIN: IMPROPER BARGAINING BY TRIAL COURT

Where the trial court acted beyond its power in bargaining with the defendants to preserve for appellate purposes issues pertaining to the voluntariness of their extra-judicial statement in return for their guilty pleas, such pleas were induced by misrepresentations of a fundamental nature and were not voluntary. Under statutory and case law, a guilty plea extinguished the possibility of an appeal on the issue of the voluntariness of the defendant's extra-judicial statement. People v. DeVaughn, 558 P.2d 872, Cal., 1977.

PRIVILEGE: Marital Privilege Bars Wife's Prenuptial Testimony

The prosecution introduced wife's testimony under hearsay exception that permits admission of an unavailable witness's prior testimony but the Court said that the defendant's hasty marriage to the key witness against him not only silenced her at trial but also prevented the state from reading into evidence her testimony at a preliminary hearing before they were married. State v. Jaques, 21 CRL 2412

SEARCH AND SEIZURE - INVENTORY

Police officers has no right to impound a DWI arrestee's car in view of the fact that the suspect had arranged to have the vehicle picked up by his brother. As a result, the LSD and speed found in the car's locked glove compartment during an inventory were inadmissible. State v. Goodrich, 21 CrL 2431

CHAIN OF CUSTODY

Gap in chain does not matter where the court is satisfied in all reasonable probability the article has not been materially altered. Thus, where a gap appeared at the state lab, in which an unreported fingerprint test was run, there was no evidence to support speculation the article was changed to incriminate the appellant and the article was properly admitted. State v. Crook Idaho 565 P.2d 576.

Admissibility of evidence and the establishment of a proper "chain of custody" of evidence should not depend on the prosecution negating all possibility of tampering or substitution, but rather only that it is reasonably probable that tampering or substitution did not occur. State v. Lange (N.D.) 255 N.W.2d 59.

DRUGS & NARCOTICS

Defendant who answered buyer's question as to price of hashish and who witnessed the sale was chargeable with the sale of controlled substance. Sheriff, Clark Cty. v. McKinney (Nev.) 565 P.2d 649.

HOMICIDE

Fact that victim's body was never recovered justifies an inference the death was caused by a criminal agency since "It is highly unlikely that a person who dies of natural causes will successfully dispose of his own body." People v. Manson (Cal.App.) 139 Cal.Rptr. 275.

HOMICIDE - INTOXICATION

Defendant's varied activities, conduct and demeanor as described by witnesses, including looking for and finding a rifle and effectively using it with calmness and dexterity preclude a finding that he was so intoxicated that either malice or intention to kill did not exist. Hogan v. State (Ala.App.) 346 So.2d 1184.

INFORMANTS

Unnecessary to have hearing to determine whether informant should be disclosed where informant's reliability was established by independent police corroboration. United State v. Gonzalez (2nd Cir.) 555 F.2d 308.

PRIOR BAD ACTS

In prosecution where defendant asserted he was incapable of forming specific intent by virtue of his intoxication, evidence that defendant committed similar act under almost identical circumstances some seven years previously was admissible on issue of specific intent. Demmert v. State (Alas.) 565 P.2d 155.

SPEEDY TRIAL

Failure to seek a prompt trial or move for dismissal for lack of a speedy trial is strong evidence defendant did not want a prompt trial. State v. Koennecke (Or.App.) 565 P.2d 376.

WITNESSES

It is entirely proper for prosecutor to acquaint witness with courtroom proceedings and to review testimony, and it was not error to permit a witness to be recalled to correct or add to her testimony even though she reviewed original testimony with others prior to being recalled. State v. Dodson (Kan.) 565 P.2d 291.

RAPE - ACCESSORIAL CONDUCT

On July 14, 1977, the Appellate Division, Third Department, of the State of New York held in People v. Evans that the defendant, a female, was properly convicted upon her plea of guilty to rape in the first degree where the defendant "had intentionally aided a male co-defendant in having sexual intercourse with the female victim by forcible compulsion." The defendant "admitted her participation which consisted "of beating and holding the victim down while the male co-defendant had intercourse with her." The Court concluded that the defendant's "liability for the conduct of her associates stands adequately established . . . and the fact that she is legally incapable of committing such an offense in her individual capacity has no effect on these proceedings."

SAN FRANCISCO LEADS IN HEROIN ADDICTION

San Francisco had the highest rate of heroin addiction per capita (916 per 100,000) in 1975, while Buffalo ranked lowest of 24 area studied (163 per 100,000). New York had the highest number of heroin addicts 69,600) although it ranked eighth in rate per 100,000 population, according to a study issued by HEW's National Institute on Drug Abuse. The number of heroin addicts in the United States in 1975 was estimated between 522,000 and 559,000. An earlier Institute study said heroin addiction costs American society $6.4 billion per year.

INSTRUCTION NO.____

(You are instructed that where more than two persons are involved, the requirements of a common understanding or meeting of the minds does not mean that each conspirator must know the identity of all the other parties or the extent of their participation.)[1] (In fact, an accused may be found guilty even though he does not know that an overt act in furtherance of the conspiracy took place.)[2]

GIVEN:

_____
Judge

Sources: (1) 16 Am Jur 2d §S 7

Blumenthal v. U.S., 332 U.S. 539, 92 L Ed 154, 68S.CT. 248

Interstate Circut v. U.S., 306 U.S. 208, 83 LEd 610, 59 S. Ct. 467

U.S. v. Agueci, 310 F 2d 817

People v. Goldstein, 289 P 2d 581

(2) U.S. v. Wilson, 23 F2d 112

16 Am Jur 2d §S 11

INSTRUCTION NO.____

You are instructed that a person commits the offense of conspiracy when, with the purpose that an offense be committed, he agrees with another to the commission of that offense. No person may be convicted of conspiracy to commit an offense unless an act in furtherance of such agreement has been committed by him or by a coconspirator. It shall not be a defense to conspiracy that the person or persons with whom the accused has conspired has not been prosecuted or convicted, or has been convicted of a different offense or is not amenable to justice or has been acquitted or lacked the capacity to commit the offense.

GIVEN:

_____
Judge

Source; 94-4-102 R.C.M., 1947

INSTRUCTION NO.____

(You are instructed that the agreement in a conspiracy need not be in any particular form or manifested in any formal words. It is sufficient if the minds of the parties arrive at a common understanding to accomplish the object of the conspiracy and this may be shown by the conduct of the parties.)[1] (The agreement need not state the means by which the conspiracy is to be carried out or what part each conspirator is to play.)[2] (The act in furtherance of the conspiracy need not go beyond preparation)[3](nor must the act in itself be criminal,)[4](but the act must be a manifestation that the conspiracy is being executed.)[5] (The act in furtherance of the conspiracy may be done either at the time of or following the agreement.)[6] (The act must clearly be independent of the agreement itself, that is, the act must be more than merely the act of entering into the agreement or merely an act necessary to the formulation of the agreement.)[7]

GIVEN:

_____
Judge

Sources:
(1) 16 Am Jur 2d §S 7
American Tobacco Co. v. U.S.,328 US 781, 90 LEd 1575, 66 S.Ct. 1125
People v. Goldstein, 289 P2d 581
(2) 16 Am Jur 2d §S 7
Frohwerk v. U.S., 249 US 204, 63 LEd 561, 39 S.Ct. 249
(3) State v. Bennett, 162 P2d 581
(4) American Tobacco Co. v. U.S., supra
(5) 16 Am Jur 2d §S 7
U.S. v. Offutt, 75 App DC 344, 127 F2d 336
U.S. v. Falcone, 311 U.S. 205, 85 LEd 128, 61 S.Ct. 204
(6) U.S. v. Westbrook, 114 F Supp 192
(7) Commission Comment Section 94-4-102 R.C.M.. 1947

INSTRUCTION NO.____

You are instructed that there can be no conviction for conspiracy without the commission of an act in furtherance of the agreement. (The crime of conspiracy is complete, however, once any act in furtherance thereof occurs.)[1] (As long as the conspiracy continues, an act in furtherance of the conspiracy by one conspirator completes the offense as to all, without any new agreement specifically directed to that act, and each conspirator is equally guilty although he may not have participated in, or had knowledge of all the details of, the execution of the conspiracy.)[2]

GIVEN:

_____
Judge

Sources: Burns v. State, 117 P2d 155

(1) 112 ALR 969
Short v. U.S., 91 F2d 614

(2) U.S. v. Westbrook, 114 F Supp 192
16 Am Jur 2d §§ 10
Blumenthal v. U.S., 332 US 539, 92 LEd 154, 68 S.CT. 248
Marino v. U.S., 91 F2d 691
113 ALR 975

NDAA SPONSORED MEETINGS

October 30 – November 3, 1977	National Conference on the New Juvenile Justice Standards Washington D.C. (Hyatt Regency, Capitol Hill) Co-sponsored by: National Council of Juvenile and Family Court Judges
January 29 – February 2, 1978	5th National Conference on Juvenile Justice San Francisco, California (Hilton) Co-sponsored by: National Council of Juvenile and Family Court Judges
February 26 – March 3, 1978	NDAA Mid-Winter San Francisco, California (Hilton)
March 5 – 9, 1978	5th National Conference on Juvenile Justice Baton Rouge, Louisiana (Hilton) Co-sponsored by: National Council of Juvenile and Family Court Judges
April 2 – 6, 1978	Vehicular Homicide/DWI Conference Chicago, Illinois (Drake Hotel) Co-sponsored by: Northwestern University Traffic Institute, Evanston, Illinois
May – June, 1978	National Executive Forum on Economic Crime (Site and date to be determined)
July 9 – 14, 1978	NDAA Mid-Summer Hershey, Pennsylvania (Hershey Motor Lodge)
January – February, 1979	The County Official: Corporate/Civil Functions (Site and date to be determined) Co-sponsored by: National Association of County Officials
February 25 – March 2, 1979	NDAA Mid-Winter Biloxi, Mississippi (The Broadwater Beach)
July 29 – August 3, 1979	NDAA Mid-Summer Mackinac Island, Michigan (The Grand Hotel)
February – March, 1980	NDAA Mid-Winter Honolulu, Hawaii
July 27 – August 2, 1980	NDAA Mid-Summer Sun Valley, Idaho
March 1 – 6, 1981	NDAA Mid-Winter Phoenix, Arizona (The Adams)
July, 1981	NDAA Mid-Summer Snowmass, Colorado

*Many of these National Conferences have been or will be approved for Continued Legal Education Credits – see reverse for details.

N.D.A.A. Scheduled Conferences . . .

DATES TO MARK ON YOUR CALENDAR . . . .

CONTINUED LEGAL EDUCATION CREDITS

We are aware of California, Florida, Iowa, Minnesota and Wisconsin offering continued legal education programs. We have or will have made the appropriate applications in order that these courses receive approvals for your C.L.E. Credits.

If your state is not listed above, and requires continued legal education, please contact us. If you need further information concerning the requirements or approvals of courses, please contact the NDAA Institute Director or your State C.L.E. Agency.

Please send additional information on the following conference(s) to me:

_____

_____

_____

My address is:

Name: _____

Address: _____

City/State/Zip: _____

Phone: (___) _____ – _____

Return this form to:

Nancy J. Randall
Institute Director
National District Attorneys Association
211 E. Chicago Avenue
Suite 1515